Supreme Court, U.S.
FILED
APR 28 1994
OFFICE OF THE CLERK

No. 93-1215

In the Supreme Court of the United States

OCTOBER TERM, 199[illegible]

MITCHELL ARMS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
MICHAEL JAY SINGER
MARK B. STERN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the United States is required by the Fifth Amendment to compensate petitioner for losses resulting from the revocation of permits to import semi-automatic assault-type rifles, following the government's determination that their importation would be contrary to the Gun Control Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Allied-General Nuclear Services v. *United States*, 839 F.2d 1572 (Fed. Cir.), cert. denied, 488 U.S. 820 (1988)	10
Andrus v. *Allard*, 444 U.S. 51 (1979)	6, 13
Avco Community Developers, Inc. v. *South Coast Regional Comm'n*, 553 P.2d 546 (Cal. 1976), cert. denied, 429 U.S. 1083 (1977)	10-11
Bowen v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986)	7
Buttfield v. *Stranahan*, 192 U.S. 470 (1904)	8, 9
Century Arms, Inc. v. *Kennedy*, 323 F. Supp. 1002 (D. Vt.), aff'd, 449 F.2d 1306 (2d Cir. 1971), cert. denied, 405 U.S. 1065 (1972)	9
Connolly v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986)	12
Everard's Breweries v. *Day*, 265 U.S. 545 (1924)	13
Gun South, Inc. v. *Brady*, 877 F.2d 858 (11th Cir. 1989)	4, 9, 12
Heckler v. *Community Health Services*, 467 U.S. 51 (1984)	11
Jacob Ruppert Corp. v. *Caffey*, 251 U.S. 264 (1920)	13
Lakeview Development Corp. v. *City of South Lake Tahoe*, 915 F.2d 1290 (9th Cir. 1990), cert. denied, 111 S. Ct. 2890 (1991)	11

Cases—Continued: Page

Lucas v. *South Carolina Coast Council*, 112 S. Ct. 2886 (1992) 12, 13
OPM v. *Richmond*, 496 U.S. 414 (1990) 11
Penn Cent. Transp. Co. v. *New York City*, 438 U.S. 104 (1978) 7
United Nuclear Corp. v. *United States*, 912 F.2d 1432 (Fed. Cir. 1990) 10

Constitution, statutes and regulations:

U.S. Const. Amend. V 6
(Just Compensation Clause) 7
Gun Control Act of 1968, 18 U.S.C. 921 *et seq.*:
18 U.S.C. 921-930 2
18 U.S.C. 922(*l*) 2
18 U.S.C. 925 3
18 U.S.C. 925(d) 2, 12
18 U.S.C. 925(d)(3) 2, 4
19 U.S.C. 1499 3
Exec. Order No. 12,808, 3 C.F.R. 305 (1993) 9
Exec. Order No. 12,810, 3 C.F.R. 307 (1993) 9
27 C.F.R.:
Pt. 47:
27 C.F.R. 47.43(a) (1988) 3
Pt. 178 2
Section 178.112 2
Section 178.112(b) 2
Section 178.112(c) 3

Miscellaneous:

114 Cong. Rec. (1968):
p. 13,225 9
p. 13,320 9
p. 13,324 9

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1215

MITCHELL ARMS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 7 F.3d 212. The opinion of the United States Claims Court (Pet. App. 15a-25a) is reported at 26 Cl. Ct. 1 (1992).

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1993. The petition for a writ of certiorari was filed on January 11, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The importation of firearms into the United States is governed by the Gun Control Act of 1968, as amended, 18 U.S.C. 921-930, which vests control over the importation of firearms in the Secretary of the Treasury. That authority in turn has been delegated to the Director of the Bureau of Alcohol, Tobacco and Firearms (ATF).

The Gun Control Act, 18 U.S.C. 922(*l*), prohibits the importation of firearms to the United States except as provided in 18 U.S.C. 925(d). Section 925(d) generally provides that the Secretary shall authorize importation of firearms if one of four conditions is met. The third of these conditions, Section 925(d)(3), the only one pertinent here, authorizes the importation of firearms "of a type that * * * is generally recognized as particularly suitable for or readily adaptable to sporting purposes." 18 U.S.C. 925(d)(3).

ATF has promulgated regulations implementing these provisions. See 27 C.F.R. Pt. 178. Section 178.112 provides that no firearm may be imported without authorization from ATF. A licensed importer wishing to import firearms must submit an application, commonly known as ATF Form 6, to obtain permission to import firearms. 27 C.F.R. 178.112(b). An application becomes a permit to import if and when the application is approved by ATF. If ATF disapproves the application, the importer is notified of the basis for the disapproval. If the application is approved, the importer is authorized to import qualifying firearms in an amount up to the quantity specified in the application. At the time of the

suspension at issue in this case, import permits were valid for six-month periods. 27 C.F.R. 47.43(a) (1988).

The United States Customs Service is responsible for determining whether goods, including firearms, satisfy applicable legal requirements for importation into the United States. See 19 U.S.C. 1499. Imported merchandise, including weapons, may be released into domestic commerce only after the Customs Service makes that determination. *Ibid.* To import firearms covered by Section 925, the importer must produce for inspection by the Customs Service a valid import permit from ATF. See 27 C.F.R. 178.112(c).

2. a. Petitioner Mitchell Arms, Inc. is a licensed importer of firearms under the Gun Control Act. In addition, Mitchell purchases such products from domestic manufacturers. In 1986, Mitchell entered into a written contract with the Federal Directorate of Supply of Yugoslavia (FDS) for the purchase and sale of firearms. Pet. App. 3a.

In 1988, Mitchell applied to ATF for renewal of four permits to import semiautomatic assault-type rifles from Yugoslavia. Those permits would have allowed Mitchell to import up to 9,000 assault rifles. The applications were approved by ATF in early December, 1988; the resulting permits were due to expire in early June, 1989. Pet. App. 3a-4a; Pet. Supp. App. 17a.

In March, 1989, ATF reviewed evidence showing a dramatic proliferation of the use of assault-type rifles in criminal activity. Accordingly, ATF announced on March 14, 1989, that it was suspending action on pending applications to import several makes of semiautomatic assault rifles, including the type of rifles that Mitchell sought to import, in order to review whether such weapons satisfied the "sporting purposes" test

of 18 U.S.C. 925(d)(3). Pet App. 3a-4a. A judicial challenge to that suspension on constitutional and statutory grounds was ultimately rejected. *Gun South, Inc.* v. *Brady*, 877 F.2d 858 (11th Cir. 1989).

On March 21, 1989, ATF expanded the suspension to include outstanding permits for the importation of semiautomatic, assault-type rifles. At the end of the review period, which was to take approximately 90 days, the agency would issue a preliminary determination as to whether the rifles were importable under the statute. If the rifles were determined not to be importable, the importer would be informed of ATF's views and would be given the opportunity to respond prior to any revocation. Pet. App. 4a; *Gun South*, 877 F.2d at 866.

Mitchell learned of the initial suspension of pending permit applications on March 14, 1989, and contacted ATF to determine whether the suspension would affect its four import permits. Pet. App. 3a. Mitchell initially was advised that it could rely on issued permits, but on March 31, 1989, it received formal notification that its permits were suspended. *Id.* at 4a.

b. Immediately after it learned of the March 14 suspension of action on pending applications, Mitchell's president met with representatives of FDS. FDS required that Mitchell provide an irrevocable letter of credit before undertaking further production. On April 3, 1989, three days after receiving formal notification that its permits had been suspended, Mitchell executed an irrevocable letter of credit for the necessary financing arrangements. Pet. App. 4a; Pet. Supp. App. 18a. The weapons arrived in New York and Los Angeles in May, 1989.

Pet. App. 4a. Because Mitchell lacked a valid import permit, the Customs Service refused to permit importation and placed the weapons in warehouses. *Ibid.*

In July, 1989, ATF informed Mitchell of its preliminary determination that the semiautomatic rifles it sought to import did not meet the statutory criteria for importation. Accordingly, ATF proposed to revoke Mitchell's import permits for semiautomatic, assault-type weapons. Pet. App. 4a; Pet. Supp. App. 18a-19a. Mitchell was advised that ATF's letter was not a final decision and that Mitchell could submit its views to the agency before such a decision was reached. Pet. Supp. App. 19a. Mitchell, together with several other interested parties, responded to and opposed the agency's proposed action. Pet. App. 4a; Pet. Supp. App. 19a.

On November 6, 1989, the Director of ATF issued a comprehensive final decision revoking Mitchell's permits. Pet. App. 4a. The decision considered at length, and rejected, Mitchell's arguments. The Director specifically rejected the argument that ATF should allow the importation of assault rifles under previously issued permits notwithstanding the agency's determination that the importation would be contrary to statute and the public safety. Pet. Supp. App. 19a.

In an attempt to alleviate possible hardship resulting from the revocation of permits, ATF advised Mitchell and other importers of a number of alternative commercial uses for their weapons, including sales to certain law enforcement agencies. Pet. App. 4a-5a. ATF also advised that it would provide assistance in dealing with the Department of State regard-

ing any license needed for the exportation of firearms that had already arrived in this country. In addition, ATF described possible modifications that would make the weapons importable under the statutory "sporting purposes" test, and it invited Mitchell to submit a modified version of its rifles for evaluation. *Id.* at 4a; Pet. Supp. App. 19a-20a. In 1990, Mitchell sought and obtained permits to import modified versions of the 9,000 firearms. Pet. Supp. App. 20a. Mitchell has since imported and sold approximately half the 9,000 assault rifles in modified configurations. *Ibid.*

3. Mitchell did not seek judicial review in district court either of the initial import suspension or of the final decision of the Director revoking its permits. Instead, on October 19, 1990, Mitchell filed this action in the United States Claims Court alleging that the government's action was a compensable "taking" under the Fifth Amendment. Pet. App. 5a.

The Claims Court rejected Mitchell's claims, holding that Mitchell had failed to state a claim on which relief could be granted. The court noted that Mitchell's permits were not transferable, conveyed no exclusive right of use, held out no promise of renewal, and contained no guarantee against revocation. It concluded that the permits therefore "bore none of the characteristics of a vested property right." Pet. Supp. App. 21a. Hence the loss of the permits was not a compensable taking. *Ibid.* A finding of compensability in these circumstances would functionally require the government "to regulate by *purchase*." *Id.* at 23a (quoting *Andrus* v. *Allard*, 444 U.S. 51, 65 (1979)).

4. The court of appeals affirmed. The court rejected Mitchell's claim that "its investment-backed

reliance on the issued import permits constituted 'property' within the meaning of the Fifth Amendment." Pet. App. 7a. Relying on this Court's decision in *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986), the court of appeals concluded that the importation of firearms is subject to heavy federal regulation, and that accordingly "Mitchell's expectation of selling its assault rifles in the Untied States was not * * * a property right because it was subject to governmental regulation * * * under the Gun Control Act." Pet. App. 7a-9a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore unwarranted.

1. The Just Compensation Clause of the Fifth Amendment by its terms protects "property." Thus, even where a plaintiff can show economic loss, a takings claim can succeed only if the government's action "interfere[s] with interests that [are] sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes." *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104, 125 (1978). Mitchell cannot meet its threshold burden of showing that its permits were "property."

Mitchell does not seriously urge that its permits became property at the time the government approved its import applications. Instead, the nub of Mitchell's argument is that its reliance created compensable property in the permits when that interest did not

otherwise exist. That reliance, Mitchell urges, created a "vested right" (Pet. 22) based on principles of estoppel. As an arms importer, however, Mitchell had particular reason to understand that its business dealings with foreign governments might be affected by new government action. Because Mitchell voluntarily operated in a pervasively regulated field with full knowledge of the government's plenary control over imports, and with knowledge of the public health and safety requirements imposed by the existing statutory scheme, its claims of reasonable reliance are without foundation.

More than three-quarters of a century before Mitchell obtained the import permits at issue here, this Court considered whether the establishment and enforcement of import standards for tea based on concerns of wholesomeness effected a "condemnation of property without hearing and the taking thereof without due process of law." *Buttfield* v. *Stranahan*, 192 U.S. 470, 492 (1904). The Court "entertain[ed] no doubt" as to congressional authority to establish appropriate standards, noting the "complete power of Congress over foreign commerce," and reasoned that "no individual has a vested right to trade with foreign nations, which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised." *Id.* at 493.

Similarly, Mitchell had no reason to believe that it had a "vested right" to import semiautomatic assault rifles. On the contrary, it was "charged with notice of the provisions of the law, and the conditions upon which [firearms] might be brought from abroad, with

a view to their introduction into the United States for consumption." *Buttfield* v. *Stranahan*, 192 U.S. at 497.[1] By 1989, it had long been established that permits to import firearms could lawfully be revoked without payment of compensation. See *Century Arms, Inc.* v. *Kennedy*, 323 F. Supp. 1002, 1016 (D. Vt.), aff'd, 449 F.2d 1306 (2d Cir. 1971), cert. denied, 405 U.S. 1065 (1972) (rejecting contention that ATF lacked authority to rescind previously issued permit, and stating that "we are aware of no licenses which once granted, can never be taken away"). See generally *Gun South*, 877 F.2d at 862.

As an arms importer, Mitchell operated with full knowledge not only that import permits were subject to change, but also that Congress imposed restrictions on the importation of firearms in an effort to preclude their use in criminal activities. As the sponsor of the Gun Control Act stated, "[t]he entire intent of the importation section is to get at those kinds of weapons that are used by criminals and that have no sporting purpose." 114 Cong. Rec. 13,225 13,320, 13,324 (1968) (statement of Sen. Dodd). See *Gun South*, 877 F.2d at 862. In that pervasively regulated area, no property rights were created by the permits issued to Mitchell, and accordingly no taking of property occurred when ATF exercised its statutory authority to prevent the very evils to which the Gun Control Act was directed.

---

[1] Indeed, at a later date, Mitchell's dealings with FDS might have been adversely affected by sanctions imposed on companies controlled by the government of the former Yugoslavia. See Exec. Order No. 12,808, 3 C.F.R. 305 (1993); Exec. Order No. 12,810, 3 C.F.R. 307 (1993).

Mitchell was, of course, free to challenge the lawfulness of the permit revocations under the Administrative Procedure Act. It did not do so. It cannot now obtain damages for its reliance on a lawfully suspended permit to import firearms. That Mitchell's reliance occurred in large measure *after* the permits were suspended underscores the weakness of its argument in this case.

2. Mitchell urges that the court of appeals should have been guided by its decision in *United Nuclear Corp.* v. *United States*, 912 F.2d 1432 (Fed. Cir. 1990). The allegedly erroneous application of intra-circuit precedent does not merit this Court's review. Moreover, as the court of appeals below correctly observed, *United Nuclear Corp.* is distinguishable. In that case, the court concluded that a property interest existed in a leasehold in a uranium mine and that restrictions on the ability to exploit the leasehold affected the property interest. Here, for the reasons we have stated, petitioner had no property interest in the permits. The court of appeals below thus correctly concluded (Pet. App. 9a) that this case is far more closely analogous to *Allied-General Nuclear Services* v. *United States*, 839 F.2d 1572, 1576-1577 (Fed. Cir.), cert. denied, 488 U.S. 820 (1988), where it rejected a takings claim based on the government's denial of a permit to operate a plant for the recycling of plutonium used in the production of nuclear energy.

Mitchell also places considerable reliance on state law cases recognizing a "vested right" to certain types of property use based on past reliance. See, *e.g.*, *Avco Community Developers, Inc.* v. *South Coast Regional Comm'n*, 553 P.2d 546 (Cal. 1976), cert. de-

nied, 429 U.S. 1083 (1977). Those cases are inapposite. As the Ninth Circuit observed in summarizing the holdings of *Avco* and similar state decisions, those cases "hold that if a government agency grants a real estate developer formal permission to build a particular project and the developer incurs certain kinds of expenses in reliance on that permission, the developer may acquire a 'vested right' to complete the project as approved." *Lakeview Development Corp.* v. *City of South Lake Tahoe*, 915 F.2d 1290, 1294 (1990), cert. denied, 111 S. Ct. 2890 (1991). Because those cases were decided on a theory of estoppel,[2] they do not stand for the proposition that a change in applicable regulations governing the use of property amounts to a taking. *Id.* at 1295.

3. Finally, even assuming the existence of a property interest in the permits, petitioner's taking analysis is flawed. Pet. 25-29. In analyzing whether a compensable taking has occurred, courts pay special consideration to "the character of the governmental action," its interference with reasonable "invest-

---

[2] Whatever the merits of that theory when asserted against state agencies, "not a single case has upheld an estoppel claim against the [federal] Government for the payment of money." *OPM* v. *Richmond*, 496 U.S. 414, 427 (1990). In addition, Mitchell cannot establish the key elements traditionally required by estoppel doctrine—that the government's conduct caused Mitchell to change its position for the worse, and that Mitchell's conduct in doing so was reasonable. See *Heckler* v. *Community Health Services*, 467 U.S. 51, 59-61 (1984). Mitchell chose to finalize the financing for the firearms with full knowledge that the government had suspended the permits; to the extent that Mitchell points to this payment as evidence that it detrimentally relied on the permits, that reliance plainly was unreasonable.

ment-backed expectations," and its "economic impact." *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986) (internal quotation marks omitted). Those factors would not support a conclusion that a taking occurred here.

The government's regulation in this case is based on the government's core responsibility to protect the public health and safety. Congress has precluded importation of firearms that do not meet the statutory criteria of 18 U.S.C. 925(d) in order to curb the flow of certain types of firearms to criminals, and Mitchell was on notice of the statute and ATF's continuing authority to review the propriety of permits issued under the Gun Control Act. In suspending and then revoking import permits for assault rifles, ATF acted in furtherance of the public health and safety concerns underlying its statutory mandate. See *Gun South*, 877 F.2d at 867.

The other relevant factors likewise counsel against the validity of Mitchell's claim. In view of the pervasiness of government regulation in the firearms area, Mitchell could not have had a reasonable expectation that its import authorization was irrevocable. Its continued reliance on its permits after they were suspended is even more obviously without reasonable justification. Indeed, Mitchell can hardly claim that the government defeated its reasonable "investment-backed expectations" when its "investment" was made *after* the permits were suspended and with full awareness of the suspension.

Mitchell's reliance on *Lucas* v. *South Carolina Coast Council*, 112 S. Ct. 2886 (1992), is also unavailing. That case repeatedly emphasized the critical importance of whether the property-holder is on

notice of limitations that might be imposed on its property under existing law. See, *e.g.*, *id.* at 2894 n.7, 2899-2900.[3] Indeed, the *Lucas* Court expressly distinguished cases involving real property from regulation of personal property where "by reason of the State's traditionally high degree of control over commercial dealings, [the property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless." *Id.* at 2899.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

MICHAEL JAY SINGER
MARK B. STERN
Attorneys

APRIL 1994

---

[3] Mitchell's assertion that the "government action was a complete denial of economically viable use of the property" (Pet. 27) is incorrect. Mitchell has been able to sell approximately half of the 9,000 rifles it initially sought to import after making modifications to them. Pet. App. 20a. Cf. *Andrus* v. *Allard*, 444 U.S. at 65-67; *Everard's Breweries* v. *Day*, 265 U.S. 545 (1924); *Jacob Ruppert Corp.* v. *Caffey*, 251 U.S. 264 (1920).